Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25	)	**MM Docket No. 93-25**
of the Cable Television Consumer	)	
Protection and Competition Act	)	
of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Service Obligations	)	

PETITION FOR RECONSIDERATION OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE

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SUMMARY

In its final rule in this proceeding, governing the capacity reserved for noncommercial educational programmers under Section 25(b) of the 1992 Cable Act, the Commission limited DBS operators to one channel per programmer. There is no basis for such a restriction in either the statute itself or the legislative history. While the Commission suggested that a one-channel-per-programmer rule would foster greater variety of programming, there is no indication that Congress intended to promote diversity as among noncommercial programmers or that it intended to promote diversity through restrictions on use of the set-aside capacity.

In any event, the Commission's desire for greater variety in programming does not support the one-channel-per-programmer limitation. DBS operators are likely to seek out diverse programming on their own, without a Commission mandate. In fact, the restriction imposed by the Commission may have the effect of discouraging programming diversity. Requiring DBS operators to limit each programmer to one channel may well result in copycat programming or programming that is not of sufficient quality to attract viewers. On the other hand, the record in this proceeding shows that a single programmer, such as PBS, can offer viewers diverse programming for a wide range of audiences. Restricting DBS operators from taking more than one program service offered by PBS could discourage them from offering programming tailored to the traditionally underserved audiences cited by the Commission in its Report and Order.

In the long run, permitting DBS operators the flexibility to offer their viewers the best noncommercial educational programming available will constitute the most effective use of the set-aside capacity. The Commission should remove the one-channel-per-programmer restriction from the final rule.

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TO: The Commission

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Pursuant to Section 1.429 of the Commission's rules, 47 CFR § 1.429, the Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") respectfully request that the Commission reconsider one aspect of its decision in the above-captioned proceeding, published in the Federal Register on February 8, 1999.[1] As part of its final rule governing use of the direct broadcast satellite ("DBS") capacity Congress reserved for noncommercial educational programmers (the "set-aside capacity"), the Commission, over the dissents of Commissioners Furchtgott-Roth and Powell,

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[1] 64 Fed. Reg. 5951 (1999). The full Report and Order accompanying the final rule was released on November 25, 1998. References to "Report and Order" below are to the Commission's November 25 order.

imposed on each DBS provider an initial limit of one channel per programmer. This restriction has no basis in the statute or in the factual record of this proceeding, and it does not serve the public interest. The one-channel-per-programmer limitation significantly limits the statutory right of public broadcasters to seek access to set-aside capacity and should be removed from the final rule.

I. BACKGROUND

The final rule published by the Commission in this proceeding implements Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act").[2] Subsection (b) of Section 25 requires the Commission to reserve DBS capacity for suppliers of noncommercial educational and informational programming upon reasonable prices, terms and conditions. The Commission's final rule requires DBS providers to reserve four percent of their channel capacity for use by qualified programmers. Under the statute, the term "qualified programmer" specifically includes noncommercial educational broadcast stations and public telecommunications entities, as defined in Sections 397(6) and (12) of the Communications Act of 1934.[3] Individual public television stations and PBS are therefore among the noncommercial programmers that may be carried on the set-aside capacity.

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2 Pub. L. No. 102-385, 106 Stat. 1460.

3 47 U.S.C. § 397(6) & (12).

In framing the final rule, the Commission concluded that the ban on editorial control Congress imposed in Section 25(b) does not bar DBS operators from choosing among qualified programmers when the demand for channel space exceeds the supply.[4] However, the Commission included in its final rule a restriction on the amount of capacity that a DBS operator may initially make available to a single qualified programmer. New Section 100.5(c)(4) of 47 C.F.R. provides:

> *Non-commercial channel limitation.* A DBS operator cannot initially select a qualified programmer to fill more than one of its reserved channels except that, after all qualified entities that have sought access have been offered access on at least one channel, a provider may allocate additional channels to qualified programmers without having to make additional efforts to secure other qualified programmers.

The Commission opined that such a limitation "will make a greater variety of educational and informational programs available to the U.S. viewing public and will provide an opportunity for carriage of programming that might not otherwise be shown."[5]

Commissioners Furchtgott-Roth and Powell dissented from the one-channel-per-programmer limitation on the ground that there is no basis for such a restriction in the statute or legislative history. Commissioner Powell also explained

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4 *See* Report and Order ¶¶ 97-114.

5 64 Fed. Reg. at 5955.

that policy considerations do not support the limitation because government intrusion is not needed to ensure diversity of programming on the set-aside capacity.

II. THE COMMISSION SHOULD REMOVE THE ONE-CHANNEL-PER-PROGRAMMER RESTRICTION.

The Commission should reconsider the one-channel-per-programmer limitation contained in Section 100.5(c)(4) of the final rule and should withdraw it. Imposition of this restriction is contrary to law and is not supported by the record in this proceeding or by the policy concerns cited in the Commission's order.

A. Section 25 Does Not Support the One-Channel-Per-Programmer Restriction.

Section 25 of the 1992 Act, which authorizes the set-aside of DBS capacity for noncommercial educational programmers, does not support a one-channel-per-programmer restriction. As noted in the reply comments APTS and PBS filed in this proceeding, Congress defined the set-aside obligation with some specificity.[6] For example, Section 25(b) specifies the percentage of DBS capacity that may be set aside, spells out certain limitations on how reasonable prices are to be determined, and provides a definition of which programmers will qualify for the set-aside capacity. But there is no mention at all of any limitation on the amount of the reserved capacity that could be occupied by a single programmer. Section 25(b)(3) states merely that a DBS provider satisfies the statutory set-aside

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[6] *See* Reply Comments of APTS and PBS, p. 12.

requirement "by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions."[7]

Moreover, there is no basis for the Commission's conclusion that it could "infer" a congressional desire to create a "forum for a range of noncommercial voices."[8] As Commissioner Powell suggests, the Commission is "inventing" the will of Congress, not implementing it, in creating an "artificial limitation" on use of the set-aside capacity.[9]

While the set-aside obligation is discussed at some length in the legislative history of the 1992 Act, there is no suggestion there that Congress wanted to limit the number of channels a single programmer could occupy, to require a particular composition for the set-aside capacity, or to foster diversity among noncommercial programmers.[10] To the contrary, Congress in the 1992 Act stated a policy to "rely on the marketplace, to the maximum extent feasible, to

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[7] *See also* Report and Order, p. 63 (dissenting statement of Commissioner Powell) ("Nothing in the statute indicates that the FCC should go beyond ensuring that DBS operators make capacity available for [noncommercial educational and informational] programming to also adopt rules about who will provide the programming.") (emphasis in original).

[8] *Id.* ¶ 117.

[9] *Id.* at 63.

[10] *See* S. Rep. No. 102-92, 102d Cong., 1st Sess. 92 (1991); H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 124-25 (1992); H.R. Rep. No. 102-862, 102d Cong., 2d Sess. 100 (1992).

achieve" the availability of a diversity of views and information.[11] In the absence of any indication that Congress intended such a limitation, the Commission lacks authority to impose the one-channel-per-programmer restriction.[12]

As Commissioner Furchtgott-Roth points out in his dissenting statement, the one-channel-per-programmer limit is inconsistent with the Commission's interpretation of the ban on editorial control contained in Section 25(b). The Commission concluded that this ban does not bar DBS providers from selecting among qualified programmers when demand for the set-aside capacity exceeds supply.[13] The further conclusion that a DBS provider nevertheless may not assign a second set-aside channel to a programmer is on its face inconsistent with the discretion on the part of the operator that the Commission found to be consistent with the editorial control provision.

The Commission attempts to justify the one-channel-per-programmer restriction by suggesting that it will result in a greater variety of programming.[14] Even if this were so (and, as explained below, it is not), there is no indication that Congress was seeking to promote variety as among noncommercial programmers

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[11] 1992 Act § 2(b)(2).

[12] *See, e.g.*, MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 234 (1994); Lyng v. Payne, 476 U.S. 926, 937 (1986).

[13] *See* Report and Order ¶¶ 97-114.

[14] *See id.* ¶ 116.

when it enacted Section 25. Rather, its intent was "to provide a minimum level of educational programming"[15] and to rely on the marketplace as much as possible.[16]

The Commission also suggests that Section 25(a) supports the one-channel-per-programmer restriction.[17] But that subsection relates only to general public interest obligations of DBS operators, including political broadcasting requirements. It is the more specific provisions of subsection (b) that govern the use of the set-aside capacity for noncommercial programmers. The Commission cannot logically invoke the more general provisions of subsection (a) to reshape or "enhance" the set-aside obligation Congress specifically defined in subsection (b).[18]

Subsection 25(b) expressly enumerates public broadcasters as entities qualified to use the set-aside capacity. The Commission's one-channel-per-

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[15] H.R. Rep. No. 102-862, at 100.

[16] *See* pages 5-6, *supra*. Congress did seek to promote programming diversity by requiring the inclusion of some noncommercial programming in what is otherwise a service with a commercial focus, but it did not prescribe multiple noncommercial programmers.

[17] *See* Report and Order ¶ 117.

[18] *See id.* Even if subsection (a) could be read to have some application to the set-aside capacity, it would not govern on this point. *See, e.g.*, Morales v. TWA, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("a specific statute will not be controlled or nullified by a general one"). Moreover, as Commissioner Furchtgott-Roth notes, the Commission's invocation of subsection (a) is inconsistent with its conclusion that imposing further public interest obligations on DBS operators would be burdensome and could prevent DBS from realizing its potential. Report and Order, p. 61.

programmer restriction directly interferes with the opportunity Congress provided for public television programming to be shown on the set-aside capacity. The restriction is thus inconsistent with congressional intent and should be removed for that reason alone.

B. The Record in This Proceeding and the Policy Concerns Cited by the Commission Do Not Support a One-Channel Per-Programmer Restriction.

The one-channel-per-programmer restriction is not only inconsistent with the statute; it also lacks support in the record or any public interest justification. Although the Commission asserted that the restriction would provide viewers with greater variety in programming, there is no basis for such a conclusion. In fact, the result of the restriction may well be to deprive DBS viewers of programming diversity.

As Commissioner Powell concluded in his dissenting statement, government intervention is not needed to ensure that DBS operators choose diverse noncommercial programming. Commissioner Powell rightly observes that DBS operators have already found that a broad range of programming helps them win subscribers and that this dynamic likely will apply to the set-aside capacity as well.[19] Thus, it can be expected that DBS operators will choose to place diverse

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[19] *See* Report and Order, p. 63.

noncommercial programming on their set-aside channels in order to appeal to as wide an audience as possible.

It is important to recognize that the diversity of programming the Commission seeks to foster is not the same as diversity of noncommercial programmers. Adding more programmers could just as easily result in copycat programming that offers DBS viewers little variety. In addition, noncommercial programmers with more limited resources may not be able to offer quality programming that will attract viewers. A DBS operator that must limit each noncommercial programmer to a single channel may end up with noncommercial programming that is neither diverse nor of high quality. Ultimately, the set-aside capacity could become of marginal benefit to the public, crowded with unwatched programming and "vanity" projects.

On the other hand, the record in this proceeding shows that a single noncommercial programmer can offer diverse programming aimed at a wide range of audiences. PBS and local public television stations have a long history of producing high quality educational and informational programming for diverse audiences and have extensive libraries of programming covering a wide range of subjects.[20] In their ex parte filing dated September 22, 1997, APTS and PBS described the programming public television expects to supply in connection with

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[20] *See* Reply Comments of APTS and PBS, pp. 12-13.

use of the DBS set-aside capacity. The September 22 filing explains that PBS has a large library of programming that could be used for this purpose. This includes telecourses for adult learners, The Business Channel, a Ready to Earn service, the Literacy Link service, a Teacher Resource Service for K-12 education, MATHLINE training programs, and the Ready to Learn service for children. The September 22 filing attaches copies of materials describing resources available from PBS in connection with the Adult Learning Satellite Service and the Teacher Resource Service, as well as a copy of the PBS Video Catalog of Educational Resources, which lists numerous educational video programs distributed by PBS.[21]

The Commission suggests that the one-channel-per-programmer restriction could foster "programming directed at traditionally underserved audiences."[22] The restriction may well defeat one of the best opportunities to introduce such programming to DBS. Public television's statutory mission includes serving unserved and underserved audiences, including children and minorities,[23]

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[21] Moreover, with the advent of digital television and its multicast opportunities, PBS and local public television stations will be developing more programming services. Public television stations look forward to providing new streams of programming covering adult education, government affairs, minority-oriented subjects, business information, and other subjects. *See* the comments filed by APTS, PBS, and the Corporation for Public Broadcasting in CS Docket No. 98-120.

[22] *See* Report and Order ¶ 116.

[23] *See* 47 U.S.C. § 396(6).

and PBS's general audience programming is a key source of programming for underserved audiences. If the Commission's goal is to increase access to such programming, this rule defeats that purpose. One of PBS' primary functions is to aggregate and distribute programming on behalf of its member public television stations throughout the country. As such PBS is well situated to aggregate specific types of programming into new channels and to augment them by acquiring additional programming from a variety of sources. If such a channel were proposed by PBS, these rules would make it less likely that it would be carried by DBS.

DBS operators may decide that they prefer to choose a variety of noncommercial programmers to fill the set-aside capacity. But if an operator concludes that PBS or an individual public television station, or some other noncommercial programmer, offers the best noncommercial programming and therefore wishes to assign several channels of the set-aside capacity to that programmer, DBS viewers should not be deprived of the opportunity to have those services. In the long run, permitting DBS viewers to enjoy the best noncommercial educational programming available will constitute the most effective use of the set-aside capacity. Removing the one-channel-per programmer restriction will ensure that the set-aside capacity provides strong services that attract viewers, fulfilling Congress's purpose in enacting Section 25(b).

III. CONCLUSION

Because the one-channel-per-programmer restriction lacks any basis in law or fact, fails to serve the public interest, and unduly restricts noncommercial entities that are specifically permitted access to set-aside capacity under the terms of the statute, the Commission should remove this provision from the final rule.

Respectfully submitted,

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